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In The Supreme Court of The United States

October Term, 1973

No. 73-314

ELIZABETH ELAINE CRAIG, et al.,

Petitioner,

vs.

THE UNITED STATES OF AMERICA, et al.,
LITTON SYSTEMS, INC.

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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Petitioner prays that a Writ of Certiorari issue to review the Judgment of the United States Court of Appeals for the Ninth Circuit entered on May 17, 1973.

JURISDICTION

The Judgment of the Court of Appeals for the Ninth Circuit was made and entered on May 17, 1973 and a copy thereof is appended to this petition in the Appendix at pp. 9 to 10. The jurisdiction of this Court is invoked under 28 U.S.C.A. Section 1254(1).

QUESTIONS PRESENTED

In a suit under the Death on the High Seas Act, 46 U.S.C.A. Sections 761-768, which was based upon Admiralty Law; the mother on her behalf and upon the behalf of her six surviving children sought recovery for damages, for the death of her husband from an airplane crash aboard the aircraft carrier U.S.S. CONSTELLATION. The action was timely filed within the two years required by 46 U.S.C.A. Section 763 against several named defendants. When petitioner sought to amend the complaint to bring in Litton Systems, Inc. in place of McKiernan-Terry Corporation after the running of the statute of limitations, the District Court refused to allow the amendment. The Court of Appeals affirmed and the questions presented are:

(1) Whether or not the Federal Rules of Civil Procedure must be narrowly construed when a fact situation is presented that is a deviation from the general solution contemplated by Federal Rule of Civil Procedure Rule 15(c)?

(2) Whether the Federal Rules of Civil Procedure Rule 15(c) pre-empt an Admiralty Court from establishing rules of procedure to see that justice is done between the parties?

STATUTES, FEDERAL RULES, AND REGULATIONS INVOLVED.

The pertinent portions of 46 U.S.C.A. Sections 761-768 and Rule 15(c) of the Federal Rules of Civil Procedure are set forth in the Appendix at pp. 15 to 18.

STATEMENT

This action arises out of an accident causing the death of a Navy pilot when he was attempting to land aboard the aircraft carrier U.S. CONSTELLATION off the Coast of Okinawa on August 19, 1963 (Cl. Tr., pp. 3 and 4). The complaint names as one of several defendants, McKiernan-Terry Corporation (Cl. Tr., pp. 1 and 3). During the landing procedure the arresting gear cable broke and the aircraft went over the side killing the pilot. The thrust of the complaint was for negligence on the part of the defendant, McKiernan-Terry, in the manufacture of the arresting gear (Cl. Tr., p. 4).

Jurisdiction in the Federal District Court was based upon the Death on the High Seas Act, Title 46 U.S.C.A. Sections 761-768 (Cl. Tr., p. 1) and the complaint was filed on August 16, 1965 within two years of the date of death (Cl. Tr., p. 1).

On October 13, 1971, plaintiff filed and served a Notice of Motion and Motion for Order Changing the Name of a defendant pursuant to Federal Rules of Civil Procedure Rule 15(a) and (c) (Cl. Tr., pp. 17 and 18) attempting to bring in Litton Systems, Inc. in place and stead of McKierman-Terry Corporation. Litton Systems, Inc. appeared specially and filed a Memorandum in Opposition to the Motion. The motion was argued and on March 13,

1972, the District Court entered its Memorandum Opinion denying the motion. The memorandum opinion points out that plaintiff had never served process on McKiernan-Terry Corporation or Litton Systems, Inc. within the statutory period and that no evidence was produced to show that Litton Systems, Inc. had notice of the institution of this action before the statute of limitations had run (Cl. Tr., pp. 47 and 48).

On appeal, the Ninth Circuit Court of Appeals held that the earlier case of Craig v. United States, et al., 413 Fed. 2d 854 (9th Cir. 1969), Cert. Denied 396 U.S. 987 (1969) precluded relitigation of the issues of notice and prejudice, and that Rule 15(c) applies to misnomer (Appendix pp. 12 to 14).

REASONS FOR GRANTING THE WRIT

The decision below should be reviewed because it neglects to apply the Federal Rules of Civil Procedure in a manner providing for substantial justice between the parties. This Court has previously stated that: "The Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits". See Foman v. Davis (1962) 371 U.S. 179, 83 S. Ct. 227, 9 L. Ed. 2d 222. The rule in question was added by the 1966 amendment and the Advisory Committee's notes specifically point out as follows:

> "In actions between private parties, the problem of relation back of amendments changing defendants has generally been better handled by the courts, but incorrect criteria have sometimes been

applied leading sporadically to doubtful results. (Citations) Rule 15(c) has been amplified to provide a general solution." Federal Practice and Procedure, Wright & Miller, Vol. 12, Appendix C, p. 395.

The codification of procedural statutes changed the harsh application of the common law and decided cases on more equitable principles. The rules set down in many jurisdictions after the advent of the Federal Rules of Civil Procedure indicate that amendments bringing in new parties are to be guided by a test as to whether or not the plaintiff actually has a cause of action against the legal entity which he attempts to substitute, and whether his fault in bringing action against a legal entity bearing a different name is only slight. See 8 A. L. R. 2d (1949) at p. 157. An Admiralty Court has traditionally had equitable powers and has attempted to do substantial justice between the parties.

Petitioner is the surviving widow of a deceased military pilot who was killed on active duty while serving his country. It is as alleged that his death was due to the negligence of McKiernan-Terry Corporation. It is also uncontradicted that the investigation into the circumstances of the accident was conducted by the United States Navy and there were no independent investigators in the area, or even allowed in the area. The accident happened at sea and the investigation file comprises 81 pages of legal size documents and 60 pages of exhibits. At no place in the official investigation is the manufacturer of the arresting gear mechanism described as a corporation other than McKiernan-Terry Corporation. Since the accident occurred on a first line fighting ship of the United States Navy, the wife and children of the serviceman were not able to participate in the investigation conducted by the authorities and must rely upon what

they find. To require dependents under circumstances of this case to ferret out corporate transfers and corporate changes when they cannot participate in the fact finding process is an insurmountable burden. The statute of limitations should not be turned into a statute of discovery. Petitioner sued within the statutory time the named defendants that the investigation showed may or may not be liable for the death in question. She had no other information upon which to sue, nor was any available.

In addition to the above, petitioner had no knowledge of the fact that Litton Systems, Inc. had purchased all of the assets and liabilities of McKiernan-Terry Corporation, and that this purchase agreement had been entered into in July of 1962, which was some 13 months prior to the death of her husband. Litigation was conducted between Litton Systems, Inc. and McKiernan-Terry Corporation and was not decided until May 15, 1969 in an unpublished opinion by the U.S. District Court, District of New Jersey, in Action No. 356-67, entitled Bouton, et al. v. Litton Industries, Inc. et al. The results of this opinion were that Litton Industries, Inc. (sued herein as Litten Systems, Inc.) was responsible for all of the liabilities of McKiernan-Terry Corporation. This action was filed against McKiernan-Terry Corporation and the present motion was to substitute the name of the purchasing corporation for the selling corporation.

Under the peculiar facts in this case, it is apparent that the fault of petitioner in not discovering the name of the true defendant and filing suit and serving the same within the two-year period is slight, and that substantial justice would require the amendment to be allowed.

CONCLUSION

Petitioner recognizes that this Court is reluctant to enter into questions of procedure, that they are best left to the Circuit Courts; but, it is submitted that the Federal Rules of Civil Procedure and the judge made Admiralty Rules should be used for decisions on the merits and not on the basis of technicalities. Rule I specifically provides that they are to be construed to secure the just, speedy, and inexpensive determination of every action. The application of a Federal Rule of Civil Procedure in an Admiralty case has eroded traditional admiralty concepts.

It is respectfully requested that this petition for a Writ of Certiorari be granted.

Respectfully submitted,

WALTER P. CHRISTENSEN

Counsel for Petitioner

APPENDIX

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

ELIZABETH ELAINE CRAIG, Administratrix of the Estate of Robert J. Craig, deceased,
Plaintiff-Appellant,

vs.

UNITED STATES OF AMERICA, TIMKIN ROLLER BEARING COMPANY, et al.,
Defendant-Appellee,

LITTON SYSTEMS, INC.,
Appellee.

No. 72-2055

OPINION

[May 17, 1973]

Appeal from the United States District Court for the Southern District of California

Before: CHAMBERS, BROWNING and CHOY, Circuit Judges.

PER CURIAM:

Appellant appeals from an order of the district court entered in an admiralty action denying her motion to amend a libel for wrongful death to change the name of defendant McKiernan-Terry Corp. to Litton Systems, Inc. after the two-year statute of limitations had run.

Previously in the same action, after the two-year statute of limitations had elapsed, appellant had moved to amend the libel to change the name of defendant DOE I to Litton Systems, Inc. Upon denial of that motion, appellant had appealed and this court affirmed the denial in *Craig v. United States, et al.*, 413 F.2d 854 (9th Cir. 1969), *cert. denied* 396 U.S. 987 (1969) *(Craig I)*.

Appellant contends that the amendment now sought merely corrects a "misnomer" and thus the second sentence of Rule

15(c), F.R.Civ.P.[1] does not apply. The second sentence of Rule 15(c) was added by 1966 amendment accompanied by the following Advisory Committee Note:

> "Rule 15(c) is amplified to state more clearly when an amendment of a pleading changing the party against whom a claim is asserted *(including an amendment to correct a misnomer or misdescription of a defendant)* shall 'relate back' to the date of the original pleading. [Emphasis added.] [3 Moore's Federal Practice ¶15.01 (9)]".

Rule 15(c), therefore, is applicable to the proposed amendment.

In *Craig I*, we applied the rule and held (1) that within the statutory period, Litton had not received notice, formal or informal, of the institution of the action, and (2) that due to its non-receipt of such notice, Litton would be prejudiced in maintaining its defense on the merits, should the amendment be allowed. Also in *Craig I*, appellant contended Litton had had notice because prior to the running of the statute it had investigated the incident resulting in her decedant's death in which a seaman also had been injured and had filed suit. We held there that "It cannot be said that Litton's notice of the incident, but not of the institution of this action, within the statutory period, did not prejudice Litton in maintaining its defense to the action." The issues of notice and prejudice may not be relitigated as appellant now attempts.

The order of the district court is *Affirmed.*

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[1] In pertinent part Rule 15(c) reads:

> (c) Relation Back of Amendments. Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading. An amendment changing the party against whom a claim is asserted relates back if the foregoing provision is satisfied and, within the period provided by law for commencing the action against him, the party to be brought in by amendment (1) has received such notice of the institution of the action that he will not be prejudiced in maintaining his defense on the merits, and (2) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against him.

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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

ELIZABETH ELAINE CRAIG, Administratrix of the Estate of ROBERT J. CRAIG, deceased,	)	
Libellant,	)	In Admiralty
v.	)	No. 3371-SD-S
UNITED STATES OF AMERICA, et al.,	)	MEMORANDUM OPINION
Respondents.	)	

This is a motion by plaintiff to change the name of the defendant from MC KIERNAN-TERRY CORPORATION to Litton Systems, Inc. On August 19, 1963, ROBERT J. CRAIG was killed when the military airplane he piloted crashed while landing on the U.S.S. Constellation. The Administratrix of the Estate, the decedent's wife, ELIZABETH ELAINE CRAIG, filed an action on August 16, 1965 (three days before the running of the statute of limitations) alleging wrongful death caused by the negligence of the defendants resulting in defects in the arresting equipment of the vessel. In that action, plaintiff's attorney named MC KIERNAN-TERRY CORPORATION as one of several defendants.

After the statute of limitations had run on the cause of action, it was discovered that Litton Industries, Inc. (Litton Systems, Inc.) in 1963 was liable for all MC KIERNAN-TERRY CORPORATION's liabilities and had been since the date of its purchase of the assets, July, 1962. (See, Bouton v. Litton Industries, Inc.,

423 F. 2d 643 (1970).) On November 16, 1966, plaintiff attempted to repair the pleading defect by a motion to amend her previous complaint to substitute Litton Systems, Inc. for "Doe 1." The motion was denied by the District Court in Craig v. United States, 284 F. Supp. 697, and affirmed by the Court of Appeals in 413 F. 2d 854 (1969). The present motion is designed to achieve the same general objective by changing the name of the defendant from MC KIERNAN-TERRY to Litton Systems, Inc. Since this motion comes after the running of the statute of limitations, plaintiff must satisfy the requirements of Federal Rule Civ. P. 15(c).

Rule 15(c) indicates that notice of the institution of the action is necessary to allow an amendment after the statute of limitations has run. This refers to actual notice of the particular claim and not merely notice of the incident out of which it arises. Craig v. U.S., 413 F. 2d 854 (1969). Accordingly, the Sevits v. McKiernan-Terry Corp., 270 F. Supp. 887 case, another wrongful death action arising out of the same plane crash aboard the U.S.S. Constellation, did not provide the requisite notice to defendant of the Craig action. (See, Craig v. U.S., supra at 858.)

The cases offered by plaintiff to support her motion lack genuine similarity to this case. Generally, plaintiffs in the cited cases were successful in changing the named defendants by showing a similarity between the names of the served party and the real defendant plus some privity relationship, or by showing some actual identity of interest between the intended defendant and the one served. Each case also involves some notice of the action by service of process on one of the parties.

The case of Godfrey v. Eastern Gas, 71 F. Supp.

175 (1947), was a situation of misnomer. The plaintiff sought to substitute Eastern Gas and Fuel Associates (also called Mystic Steamship Division) for Mystic Steamship Company. An agent for Eastern Gas had been served with notice, and there was a similarity of names. Similarly, in Travelers Ind. Co. v. U.S., 382 F. 2d 102 (1967), Travelers Insurance Co., having common officers and directors with Travelers Indemnity Co., was served. And in Marino v. Gothan Chalkboard, 259 F. Supp. 953 (1967), Gothan Trim was the real defendant even though Gothan Manufacturing was served with the complaint. Since service was made and the two companies had identical directors and officers, notice was held properly effected. Finally, in Wentz v. Alberto Culver Co., 294 F. Supp. 1327 (1969), the court allowed an amendment upon the theory that it merely corrected a misnomer and did not change a party. In that case, a complaint was filed against Alberto Culver Co., an Illinois corporation, which had been dissolved and its assets acquired by Alberto Culver Company, a Delaware corporation. Influencing the court were the facts that the state name was not a part of either corporate name; the Delaware corporation had been served and one of its agents had receipted for service by signing as merely an agent of "Alberto Culver Company, a corporation"; and a great deal of correspondence pertaining to the action had occurred between plaintiff's counsel and agents of the Delaware corporation prior to and after its filing.

The distinctive deficiency in the plaintiff's case is that no service of process was made on either MC KIERNAN-TERRY or Litton Industries within the statutory period. In addition, no evidence is produced by plaintiff to sufficiently indicate that Litton Industries, Inc. (Litton Systems, Inc.) had any notice or knowledge of the institution of this action before the statute of

limitations had run.

Plaintiff's motion is DENIED.

DATED: March 13, 1972.

/s/
EDWARD J. SCHWARTZ, Chief Judge, United States District Court

Pertinent Portions of 46 U.S.C.A. Sections 761-768.

§ 761. Right of Action; Where and by Whom Brought.

Whenever the death of a person shall be caused by wrongful act, neglect, or default occurring on the high seas beyond a marine league from the shore of any State, or the District of Columbia, or the Territories or dependencies of the United States, the personal representative of the decedent may maintain a suit for damages in the district courts of the United States, in admiralty, for the exclusive benefit of the decedent's wife, husband, parent, child, or dependent relative against the vessel, person, or corporation which would have been liable if death had not ensued. Mar. 30, 1920, c. 111, § 1, 41 Stat. 537.

§ 762. Amount and Apportionment of Recovery.

The recovery in such suit shall be a fair and just compensation for the pecuniary loss sustained by the persons for whose benefit the suit is brought and shall be apportioned among them by the court in proportion to the loss they may severally have suffered by reason of the death of the person by whose representative the suit is brought. Mar. 30, 1920, c. 111, § 2, 41 Stat. 537.

§ 763. Limitations.

Suit shall be begun within two years from the date of such wrongful act, neglect, or default, unless during that period there has not been reasonable opportunity for securing jurisdiction of the vessel, person, or corporation sought to be charged; but after the expiration of such period of two years the right of action hereby given shall not be deemed to have lapsed until ninety days after a reasonable opportunity to secure jurisdiction has occurred. Mar. 30, 1920, c. 111, § 3, 41 Stat. 537.

§ 764. Rights of Action Given by Laws of Foreign Countries.

Whenever a right of action is granted by the law of any foreign State on account of death by wrongful act, neglect, or default occurring upon the high seas, such right may be maintained in an appropriate action in admiralty in the courts of the United States without abatement in respect to the amount for which recovery is authorized, any statute of the United States to the contrary notwithstanding. Mar. 30, 1920, c. 111, § 4, 41 Stat. 537.

§ 765. Death of Plaintiff Pending Action.

If a person die as the result of such wrongful act, neglect, or default as is mentioned in section 761 of this title during the pendency in a court of admiralty of the United States of a suit to recover damages for personal injuries in respect of such act, neglect, or default, the personal representative of the decedent may be substituted as a party and the suit may proceed as a suit under this chapter for the recovery of the compensation provided in section 762 of this title. Mar. 30, 1920, c. 111, § 5, 41 Stat. 537.

§ 766. Contributory Negligence.

In suits under this chapter the fact that the decedent has been guilty of contributory negligence shall not bar recovery, but the court shall take into consideration the degree of negligence attributable to the decedent and reduce the recovery accordingly. Mar. 30, 1920, c. 111, § 6, 41 Stat. 537.

§ 767. Exceptions From Operation of Chapter.

The provisions of any State statute giving or regulating rights of action or remedies for death shall not be affected by this chapter. Nor shall this chapter apply to

the Great Lakes or to any waters within the territorial limits of any State, or to any navigable waters in the Panama Canal Zone. Mar. 30, 1920, c. 111, § 7, 41 Stat. 538.

Pertinent Portions of Rule 15(c) of the Federal Rules of Civil Procedure.

Rule 15. Amended and Supplemental Pleadings.

* * * * * *

(c) Relation Back of Amendments. Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading. An amendment changing the party against whom a claim is asserted relates back if the foregoing provision is satisfied and, within the period provided by law for commencing the action against him, the party to be brought in by amendment (1) has received such notice of the institution of the action that he will not be prejudiced in maintaining his defense on the merits, and (2) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against him.

The delivery or mailing of process to the United States Attorney, or his designee, or the Attorney General of the United States or an agency or officer who would have been a proper defendant if named, satisfies the requirement of clauses (1) and (2) hereof with respect to the United States or any agency or officer thereof to be brought into the action as a defendant.

(d) Supplemental Pleadings. Upon motion of a party the court may, upon reasonable notice and upon such terms as are just, permit him to serve a supple-

mental pleading setting forth transactions or occurrences or events which have happened since the date of the pleading sought to be supplemented. Permission may be granted even though the original pleading is defective in its statement of a claim for relief or defense. If the court deems it advisable that the adverse party plead to the supplemental pleading, it shall so order, specifying the time therefor. As amended Jan. 21, 1963, eff. July 1, 1963; Feb. 28, 1966, eff. July 1, 1966.